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No. 99-

IN THE

Supreme Court of the United States

ROBERT HUNTER SOUDERS,

Petitioner,

v.

DONELLA J. LUCERO, individually and in her capacity as Manager of Security Services for Oregon State University; ROBERT E. BROWN, individually and as supervisor of Security Services for Oregon State University; and TY DUBY, individually and as an Oregon State Police Officer,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Are public universities required by the First (free speech and assembly) and Fourteenth (due process, liberty and property) Amendments to provide due process before excluding a member of the public, other than a university student, a faculty member or an employee, from attending public meetings on campus at places that the universities have designated as open to the public?

B. Do the same constitutional provisions require public universities to provide due process of law before excluding such a member of the public from using the campus libraries, also open to the public, for research necessary to earning his livelihood?

PARTIES TO THE PROCEEDING

The names of the parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed here, are as follows:

ROBERT HUNTER SOUDERS, Plaintiff-Appellant.

DONELLA J. LUCERO, individually and in her capacity as Manager of Security Services for Oregon State University, Defendant-Appellee.

ROBERT E. BROWN, individually and in his capacity as Supervisor of Security Services for Oregon State University, Defendant-Appellee.

TY DUBY, individually and as an Oregon State Police Officer, Defendant-Appellee.

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Petitioner, Robert Hunter Souders, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in this case was entered on November 15, 1999 and is reported at 196 F.3d 1040 (9th Cir. 1999). (App. 1a) The unpublished decision of the United States District Court for the District of Oregon was entered on April 16, 1998. (App. 14a)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1999. The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1) and 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. (App. 21a)

STATEMENT OF THE CASE

This case involves the Ninth Circuit Court of Appeals' ruling that the exclusion of plaintiff from the Oregon State University campus and library without due process for alleged stalking activities did not violate his First and Fourteenth Amendments rights under the United States Constitution. Federal jurisdiction in the court of first instance was based on 28 U.S.C. §§ 1343(3), (4) and 1331.

A. Background

For more than 20 years Petitioner Robert Souders, a graduate of Oregon State University ("OSU"), attended public policy meetings on the OSU campus, including political speeches and discussions, as well as Corvallis city council meetings. For five years prior to his exclusion from campus, Souders regularly read periodicals at the OSU Library for the purpose of earning his living as a stock investor. (ER 96)[1]

In late 1993 and early 1994, a female student at OSU filed civil stalking complaints against Souders in Benton County Circuit Court. The court issued a temporary restraining order, and later after a hearing, issued a final order finding that plaintiff had engaged in stalking behavior and prohibiting him from having any contact with the student or being near her classes. (ER 9-12) Petitioner did as ordered.[2] (ER 22)

In February, 1995, the University issued an order excluding petitioner from the Oregon State University campus. (ER 16) He was advised that the order would remain in effect until June 15, 1995 when the student graduated. (ER 17) Petitioner was given no reasons for his exclusion

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1. References to the "ER" are to the "Plaintiff-Appellant's Excerpt of Record" filed by the petitioner with his brief in the Ninth Circuit Court of Appeals.

2. The Stalking Protective Order was nullified by the Oregon Court of Appeals finding the statute unconstitutionally vague. *Foster v. Souders*, 135 Or. App. 542, 899 P.2d 733 (July 1995), citing *State v. Norris Romine*, 134 Or. App. 204 (1995).

from campus. He appealed the exclusion order[3] but his appeal was denied. (ER 17) The record shows no violation of the University's exclusion order. (ER 22)

On October 16, 1995, Donella Lucero, the Manager of Security Services, issued guidelines to Campus Public Safety Officers regarding the use of exclusion orders. (ER 18) Her guidelines stated that exclusion orders would be issued against people who are "a danger to persons or property on campus by an action (breaking the law)" but were not appropriate for "looking odd or for a minor violation." *Id.* The memo further advised that exclusion orders must be accompanied by an officer's report giving specific reasons for the exclusion, alternate measures taken to seek compliance before the warning was issued, and specific instructions or conditions given to the person. *Id.*

During this time, OSU had a policy in effect regarding "trespass on campus-exclusion orders." (App. 21a) While the policy did not explicitly address "exclusion orders" it was the protocol applied to the issuance of exclusion orders by the OSU Campus Security Office. (ER 78-79) The policy provided for no hearing procedure in the contest of a "trespass warning." The policy did require that a written report be completed and state, at a minimum: (A) the specific reason the trespass warning was issued, (B) all alternative measures taken to seek compliance before the warning was issued, (C) the details of the incident, and (D) any specific instructions or conditions given to the trespass person. (App. 24a)

On December 4, 1995, Lucero informed Student Services that she would immediately issue an exclusion order directed

3. The state has no record of petitioner's appeal.

at any person who was accused of stalking on the OSU campus. (ER 22) On December 7, 1995, Joy Delgado, an OSU student, filed a complaint about petitioner with Campus Security. On the same date, defendant Lucero issued a notice excluding petitioner from the entire OSU campus. (ER 23) The University did not give petitioner a copy of the complaints made against him nor was he given any other written explanation of the reasons for his exclusion from the campus. (ER 72-73, 75-76)

On December 13, 1995, following a brief hearing, a Temporary Stalking Protective Order was entered in Benton County Circuit Court. The Order was limited in scope in that petitioner was not required to stay off the campus, but only to avoid having contact with Joy Delgado and to stay away from two buildings on the OSU campus. (ER 27-28) In February, 1996, after a hearing[4], a final Stalking Protective Order was entered, with the similar restrictions.[5] (ER 32-33) The Order stated that Souders could request dismissal of the order in the event Delgado moved from Corvallis or at the expiration of a two-year period. (ER 33)

Following entry of the second exclusion order, petitioner filed an appeal, which was denied by defendant Lucero in March, 1996. (ER 34) Although designated by university

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4. Delgado said that petitioner was following her around campus and had been seen around the building where she worked and around and near her residence. She alleged that he didn't say anything to her and that he crossed the street very rapidly to avoid confrontation. (ER 30)

5. The constitutionality of the Delgado Protective Order is presently pending before the Oregon Supreme Court. *Delgado v. Souders*, 146 Or. App. 580, *rev. allowed*, 326 Or. 43 (1997).

regulations to hear the appeal, Lucero admitted that she wasn't an impartial person to decide petitioner's case. (ER 87-88) No record was made and no witnesses testified.

Petitioner returned to the OSU campus on several occasions — not to stalk Delgado in violation of the Protective Order — but to attend a Corvallis city council meeting and to participate in a three-day cultural event (DaVinci Days), and to go through the campus bookstore and memorial union. (ER 62-63) For this reason, the University later denied him permission to attend a political candidates forum, a lecture by Howard Zinn, and speech by the University President. (ER 35) Several subsequent requests to attend campus public affairs meetings were allowed — some unescorted — by the University; however, the University refused to lift the exclusion order, even after the expiration of the Protective Order, and refused to grant petitioner a hearing contesting the exclusion. (ER 38)

B. The Proceedings Below

On February 21, 1997, Souders filed a lawsuit in United States District Court against Donella Lucero, Oregon State University's manager of security services, and OSU security officers under 42 U.S.C. § 1983, challenging the exclusion orders under the First and Fourteenth Amendments of the United States Constitution.

Defendants filed for summary judgment and petitioner filed a cross-motion for summary judgment. Refusing to allow the case to proceed to trial, the United States District Court held that OSU had excluded Souders from campus "for stalking behavior, not for exercising assembly or speech rights." (App. 17a) The court also found that Souders had

no property or liberty interest in using the campus library or attending political events. (App. 18a) Because the court concluded that neither the First nor Fourteenth Amendment was implicated in the University's action against Souders, the court did not address the deficiencies of the University's process and found that he was afforded "any process he might have been entitled to in the form of post-deprivation hearing opportunities." (App. 18a) The court granted defendants' motion, denied petitioner's cross-motion, and dismissed the action, finding that petitioner had not stated a claim under the First or Fourteenth Amendments. (App. 20a)

Petitioner appealed to the Ninth Circuit Court of Appeals which affirmed the district court. (App. 2a) Noting that there was no precedent that applied directly to the facts of this case, the Ninth Circuit held that petitioner did not have a constitutionally protected interest in having access to the University. (App. 11a, 13a) The court found that it was unnecessary to decide whether the University had afforded Souders adequate due process before excluding him from campus. (App. 13a)

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION.

There is a need for judicial guidance in this matter. The public's access to public universities is a matter of first impression for this Court and of exceptional and wide national importance.

This case involves important questions of federal constitutional law that have not been, but should be, settled by this Court. Although, as the Court of Appeals pointed out, there are no cases directly on point from this or any other court, (App. 11a), the body of First Amendment case law directs a conclusion contrary to the judgment reached by the Ninth Circuit.

Oregon State University has opened its campus to the public for expressive activity in designated areas. The public is invited to attend and participate in lectures, forums, and discussions, including those of a political nature, as well as Corvallis city council meetings. The general public is also welcome to use the campus library for private research. Having intentionally opened its campus for public discourse, for assembly and debate as a designated public forum, the University may not arbitrarily restrict the First Amendment rights of visitors.

Rather than recognizing specified University building and areas as public forums, the courts below ignored the extensive First Amendment jurisprudence that has developed on this issue. They have failed to examine how OSU's exclusion of petitioner from the campus interfered with his right to receive information by preventing him from attending and participating in lectures, forums, and discussions on campus, as well as with petitioner's right, as a member of the public, to obtain information from the campus library. The lower courts also failed to address the fact that petitioner's total and indefinite exclusion from the OSU campus did not comply with First Amendment law requiring time, place, and manner restrictions to be "narrowly drawn."

A considerable number of people are affected by this matter, as they look to public universities as a place to receive written and spoken information. In excess of 150 million persons live in the vicinity of public university.[6] As University of Oregon President Dave Frohnmayer presciently analyzed the outsider issue 32 years ago: "University facilities are often suited for use as a public forum; they may indeed constitute the only available one."[7]

II.

THE COURT OF APPEALS FAILED TO CONSIDER WHETHER OR NOT PORTIONS OF THE OSU CAMPUS ARE DESIGNATED PUBLIC FORUMS IN WHICH THE PETITIONER HAD A RIGHT TO PARTICIPATE UNLESS EXCLUDED BY DUE PROCESS OF LAW.

The Court of Appeals failed to take the necessary first step in analyzing this case under the First Amendment to the Constitution. The initial stage in a free speech case is to consider whether or not petitioner has a First Amendment right to engage in the activity. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 474 U.S. 788, 797, 105 S. Ct. 3439, 3446, 87 L. Ed. 2d 567 (1985). In this case, however, the Ninth Circuit did not directly address whether

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6. American's Best Colleges, U.S. News and World Reports, 2000: Statistical Abstract of the United States: 1998, No. 44 [75 Largest Metropolitan Area — Racial and Hispanic Origin Populations: 1996].

7. D. Frohnmayer, *California Law Review*, "The University and the Public: The Right of Access by Nonstudents to University Property," Volume 54: 132, 167 (1966).

or not the First Amendment was implicated in Souders' claim, but first examined whether the activity complained of by the University justified his exclusion. The court concluded that Souders had engaged in "stalking" female students which justified his exclusion from the University. Because he was excluded for civil stalking, the court found that the First Amendment was not implicated and that, therefore, it was unnecessary to examine the due process afforded to him. (App. 13a)

The proper first step in this case is to determine whether Souders has a right under the First Amendment to go on the OSU campus to use the library and to listen to public speakers, and attend and participate in city council meetings and conferences. A review of the decisions of this court compels the conclusion that petitioner does have a First Amendment right of access to the information offered by the University to the general public.

This court has employed three categories of speech forums in analyzing the First Amendment right of access. The traditional public forums are those which by long tradition have been devoted to assembly and debate, such as streets and parks, the "quintessential public forums." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983). In these public forums, the state may enforce time, place, and manner of expression which are content-neutral and are narrowly tailored to serve a significant government interest. *Id.*, 460 U.S. at 45, 103 S. Ct. at 955.

The second class of public forum is "public property which the state has opened for use by the public as a place for expressive activity." *Perry Education Association v.*

Perry Local Educators' Association, 460 U.S. at 45-46, 103 S. Ct. at 955. Although not obligated to open these areas to the public, once it does so, the government is bound by the same limitations as exist in the traditional public forum context. *Id.*, *supra*; *Widmar v. Vincent*, 454 U.S. 263, 267-68, 102 S. Ct. 269, 273, 70 L. Ed. 2d 440 (1981) ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, *even if it was not required to create the forum in the first place.*" (Emphasis added)). *See also Brown v. Louisiana*, 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966), where this court held that a State may regulate the use of its libraries or other public facilities, but "it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all." 383 U.S. at 143, 86 S. Ct. at 724.

Oregon State University was not required to open its campus meeting places and library to the general public. It chose to do so. As the University conceded, whether visitors are doing independent research in the campus library or attending a public meeting at a University meeting place, they are welcome on campus. (ER 23-24) At OSU, the general public is invited to university meeting rooms to attend and hear the opinions of political and non-political speakers on a wide variety of subjects, and to observe and listen to the making of public law at the Corvallis city council meetings, which are occasionally held on the OSU campus.[8]

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8. As Oregon's oldest state-assisted institution of higher education, founded in 1868, OSU is Oregon's only Carnegie comprehensive research university. The University is internationally respected for teaching, research and public service and is a Land Grant, Sea Grant and Space Grant university. 1997-98 *Oregon Blue Book*, p. 193.

(ER 23-24) Petitioner has been a part of this "community of citizens" for more than two decades.[9] (ER 96, 97-98)

Public meetings, such as those held at OSU are "designated" or "limited" public forums. *See Madison Joint Sch. Dist. v. Wisconsin Empl. Relations Comm'n*, 429 U.S. 167, 174-75, 97 S. Ct. 421, 426, 50 L. Ed. 2d 376 (1976) (school board meeting "was open to the public"); *Widmar v. Vincent*, *supra* (university meeting places are a designated public forum).

As the Court of Appeals pointed out, there is no precedent that applies directly to the issue of a visitor who is present on campus to listen and participate in public meetings and public speaking events, and to use the library, rather than to leaflet or make speeches himself. (App. 12a) "Virtually every decision dealing with the question of the openness of college campuses is a free speech case, where the analysis centers on whether a university may prohibit or regulate on campus the speech or assembly activities of certain individuals or groups — both student and non-student." (App. 12a)

While there are no cases directly on point, existing case law — ignored by the Ninth Circuit — does set out general principles that support petitioner's position. This court has held that a public university meeting place constitutes a public forum, such that the University may exclude a particular group only by showing that its regulation is

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9. *See* D. Frohnmayer, *California Law Review*, *supra*, Volume 54: 132, 173 ("[A] university * * * constitutes not merely a physical plant suitable as a speaking facility; it is a particular community of citizens, in which communication of ideas is to be encouraged.")

necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Widmar v. Vincent, supra*, 454 U.S. at 267-269, 102 S. Ct. at 274. Lower courts have held that once a state university makes public property generally available to the public, *it may not arbitrarily restrict the freedom of non-students*, lawfully on the property, to exercise their First Amendment rights. *Jones v. Board of Regents of Univ. of Arizona*, 436 F.2d 618, 620 (9th Cir. 1970); *Spartacus v. Board of Trustees of Illinois*, 502 F. Supp. 789, 798 (N.D. Ill. 1980).[10]

See also Dunkel v. Elkins, 325 F Supp. 1235, 1245 (D. Md. 1971) (Except in an emergency, a state university, as a public forum, must hold an administrative hearing before prohibiting an "outsider" from having access to campus); *Watson v. Board of Regents of the University of Colorado*, 512 P.2d 1162, 1165 (1973).

The Court of Appeals refused to consider this line of cases, finding that because Souders was not banished for making a speech or distributing literature, his exclusion from the OSU campus did not implicate the First Amendment. This is an unreasonably narrow interpretation of petitioner's right to free speech. Since 1943, this court has recognized that the First Amendment includes the freedom to receive information and ideas as well as the freedom to speak. *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943). As the court later said in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965):

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10. Similarly, when a public library allows community groups to meet in its auditorium, it has created a public forum to which it must allow other groups access. *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989).

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and the freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.

Souders was prevented by his exclusion from exercising his First Amendment right to attend — and personally participate in — lectures, forums, and discussions on campus, that is, his right to receive information as a member of the general public.

Petitioner's exclusion from the campus library is equally offensive as he has been prevented from using the library for expressive activity, namely communication of the written word. *See Board of Education v. Pico*, 457 U.S. 853, 866, 102 S. Ct. 2799, 2808, 73 L. Ed. 2d 435 (1982) (Noting that the First Amendment protects not only the right to self-expression, but also guarantees "public access to discussion, debate, and the dissemination of information and ideas."); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992) (Holding that a public library is limited public forum for purposes of the First Amendment).

See also Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 390, 89 S. Ct. 1794, 1807, 23 L. Ed. 2d 371 (1969) ("*[I]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.* That right may not constitutionally be abridged either by Congress or by the FCC." (Emphasis added))

Despite the overwhelming evidence that designated areas at the OSU campus are public forums, the Ninth Circuit did not find that they are. Rather, that court proceeded to find that "it does not follow that the University must allow all members of the public onto its premises regardless of their conduct." (App. 8a) The court stated that educational administrators must have authority and flexibility to carry out their duties. Although OSU has no rule or regulation explicitly allowing the University to exclude people for certain conduct, the Ninth Circuit inferred such authority from their "Policy and Procedure." This policy does not explicitly set out grounds for excluding outsiders, but only addresses the University's procedure regarding the issuance of "trespass warnings." (App. 22a) Nonetheless, this policy is the only protocol applicable to the issuance of exclusion orders by the OSU Campus Security Office.[11] (ER 78-79).

In finding that Souders had not established a constitutionally protected interest in having access to the University, the Ninth Circuit described petitioner's argument as stating that "he has a right to be on the OSU campus, *regardless of* conduct." (App. 11a) This argument, the court said, "goes too far." (App. 11a) Petitioner agrees that such an argument does, indeed, go too far; however, this is not an accurate statement of his position. Petitioner agrees with the Ninth Circuit that: "Whatever right he has to be on campus must be balanced against the right of the University to exclude him." (App. 11a) Petitioner does not advocate free access to all of the University's grounds or buildings, as the

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11. Although not an official policy, guidelines for the issuance of exclusion order were given to campus public safety officers by defendant Lucero. (ER 18) These guidelines specified that visitors to campus could only be excluded "for breaking the law" and not for "looking odd or for a minor violation." *Id.*

Ninth Circuit suggests. (App. 11a) He agrees that disruptive conduct on the campus should be prevented. His objection, however, is that the weighing of these competing rights was not done by the University. In order to effectuate this balancing act, in order to "narrowly tailor" the University's restriction on his right to expressive activity, *particularly in lieu of any specific rules regulating visitor conduct,* the University was required to provide at least rudimentary due process before excluding petitioner. *See Dunkel v. Elkins*, *supra*, 325 F. Supp. at 1245; *Watson v. Board of Regents of the University of Colorado*, *supra*, 512 P.2d at 1165 (holding that persons who are not students, faculty or employees must be given procedural due process before the university can permanently deny them access to university functions and facilities).

The University should have limited the period of petitioner's exclusion or allowed petitioner to return to campus after he complied with specific rules of conduct. *See Brinkmeier v. City of Freeport*, 1993 WL 248201 (N.D. Ill. 1993) (public library rules lacking a time limit for excluding disorderly patrons not reasonable); *cf. Kreimer v. Bureau of Police for Town of Morristown*, *supra*, 958 F.2d at 1264 (public library rules left open "alternative channels for communication" in the sense that a patron excluded for offensive body order may re-enter after complying with the rules).

Petitioner conscientiously followed the restrictions placed upon him by the Benton County Circuit Court; this was not sufficient to placate the University. Despite his compliance with the court's orders, the University excluded petitioner from its campus indefinitely.[12] Rather than crafting

12. The Ninth Circuit decision assumes that the University only excluded petitioner "temporarily." (App. 13a) However, there was (Cont'd)

narrow restrictions — as the Benton Circuit Court had done in its Protective Orders — the University failed to balance petitioner's First Amendment rights with the student's need for protection. Petitioner should have been allowed to use the University facilities and attend meetings as long as he avoided contact with the complaining woman. There was no evidence that further restrictions were needed in order to prevent disruption on campus. The University has allowed petitioner to attend some public events without escort, which indicates they do not consider him a real danger to students or staff. (ER 85-86, 98)

Finally, the Ninth Circuit mistakenly relied on this court's ruling in *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897 (1985). (App. 12a) There, the court held that where a military base issued a "bar letter" on valid grounds, a person may not claim immunity from its prohibition merely because the base temporarily opened its facilities to the public. The case is distinguishable because, as the *Albertini* court found, the military base setting, with the "historically unquestioned power of a commanding officer to exclude civilians from the area of his command" cannot be analyzed in the same manner as a traditional public forum. 472 U.S. at 686-687, 105 S. Ct. at 2905. A military base, which has the undisputed purpose of national security, is hardly comparable to the historically open nature of the public university. *See Greer v. Spock*, 424 U.S. 828, 838, 96 S. Ct. 1211, 1217, 47 L. Ed. 2d 505 (1976). Also, Albertini had been found to be a threat to national security and had

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(Cont'd)
no limit to the second exclusion order and it was not lifted, even after the complaining student was no longer at the University. The record shows that the exclusion order was still being enforced in January, 1998. (ER 95-100)

been criminally convicted of doing the very act which caused his exclusion from the military base. *Id.* at 677. Unlike petitioner, he was given full procedural due process in his criminal proceeding before conviction. The *Albertini* case does not support the proposition that OSU's exclusion was valid.

The Ninth Circuit's ruling in this case is not consistent with the weight of First Amendment jurisprudence holding that the state can restrict the use of a traditional or limited public forum only by narrowly drawing restrictions for a compelling state interest.

III.

THE COURT OF APPEALS FAILED TO CONSIDER WHETHER PETITIONER HAS A LIBERTY OR PROPERTY INTEREST IN ATTENDING PUBLIC MEETINGS OR IN USING MATERIALS AT THE CAMPUS LIBRARY TO EARN HIS LIVELIHOOD AS A STOCK INVESTOR.

The Court of Appeals did not directly address petitioner's contention that he has constitutionally protected property and liberty interests in his use of the OSU campus. Petitioner has a property interest in being allowed to use the campus library for research necessary to earning his livelihood. He has a liberty interest in having access to the library and to discussion, debate, and the dissemination of information and ideas available at public meetings and lectures.

The right to pursue one's occupation or profession is a both a liberty and property right protected from state

deprivation or undue interference. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239, 77 S. Ct. 752, 755-56, 1 L. Ed. 2d 796 (1957). "The right to work for a living is of the very essence of the personal freedom and opportunity" that the Constitution was meant to protect. *Truax v. Raich*, 239 U.S. 33, 41, 36 S. Ct. 7, 10-11 (1915). Petitioner's chosen occupation as an independent stock investor is clearly "private employment" protected by the Fifth Amendment. *See Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377 (1959).

This court has defined a "property interest" very broadly. In *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2769, 33 L. Ed. 2d 570 (1972), the court refused to limit the concept of "property" by "a few, technical forms," saying:

> Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." (Citation omitted) A person's interest in a benefit is a "property" interest for due process purposes if there are such rules *or mutually explicit understandings* that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). (Emphasis added)

In *Perry v. Sindermann*, *supra*, a teacher was found to prove a legitimate claim of entitlement to job tenure based upon a *de facto* tenure system arising from rules and understandings ("mutually explicit understandings") fostered by the university. In this case, OSU invites visitors to attend

and participate in lectures, public policy meetings, and conferences. The University has an established practice of allowing the public free access to its grounds. Souders had been permitted to review periodicals at the campus library for five years in his occupation as a stock investor. (ER 96) As Dr. Warren Schroeder, the Vice President of OSU, acknowledged, that the use of OSU facilities by non-students to earn a living, was "something we allow or permit." (ER 68)

Based upon these "mutually explicit understandings," petitioner has a property interest in using the University library to earn his living as a stock investor. As we can see from Dr. Schroeder's comments, this is not a "unilateral expectation" on the part of petitioner. OSU knows that people use campus resources to earn a living and — perhaps to earn the goodwill of citizens of the state — they allow it.

Petitioner also has a "liberty" interest in being allowed to conduct his research at the campus library. The right to hold a specific private employment and to follow a chosen profession comes within the "liberty" concepts of the Fifth Amendment, as well as within the concept of "property." *Greene v. McElroy*, *supra*; *see Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 756-757 (9th Cir. 1985). The concept of a "liberty interest" — like a "property interest" — is very broadly defined. As this court has said,

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring

> up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized * * * as essential to the orderly pursuit of happiness by free men.

Board of Regents v. Roth, 408 U.S. 564, 572, 92 S. Ct. 2701, 2706-2707, 33 L. Ed. 2d 548 (1972).

An individual's right to be in a public place — whether to take part in public events, listen to speeches, or simply go for a walk — is clearly part of the liberty protected by the Due Process Clause of the Fourteenth Amendment. This right to "remove from one place to another according to inclination" is "an attribute of personal liberty" protected by the Constitution. *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 1858-59, 144 L. Ed. 2d 67 (1999) (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment), citing *Williams v. Fears*, 179 U.S. 270, 274, 21 S. Ct. 128, 45 L. Ed. 186 (1900) and *Papachristou v. Jacksonville*, 405 U.S. 156, 164, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

Petitioner has demonstrated both a property and a liberty interest in using the public University's open library for his research. Like university students and staff, petitioner has liberty and property rights protected by the Fourteenth Amendment in earning his living by doing research in the campus library. He has also demonstrated a liberty interest in exercising his First Amendment right to receive information and ideas by attending public policy events on campus. These rights and interests entitle petitioner to due process prior to being excluded from the campus and require that the University's restrictions upon him be "narrowly

drawn." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. at 45, 103 S. Ct. at 955.

IV.

THE COURT OF APPEALS ERRED IN FAILING TO ADDRESS THE ADEQUACY OF OSU'S PROCEDURE IN REMOVING PETITIONER FROM CAMPUS.

The University failed to provide petitioner with even the most basic elements of due process before excluding him indefinitely from the entire campus. However, the Court of Appeals — like the District Court — concluded that it was not necessary to review the adequacy of the University's procedures because petitioner "had no constitutionally-protected interest" requiring due process protection. (App. 13a) As discussed above, petitioner does have a First Amendment right to use the OSU library and to attend public events on campus. He was entitled to procedural safeguards before being excluded from these public places.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965).

Under the circumstances, defendant's due process procedures were entirely inadequate. First, on both occasions that petitioner was excluded, he was not informed of the charges or of the evidence against him. (ER 96-97) While defendant Lucero claimed that she explained to petitioner why he was being excluded, she admitted that he was given no specific details because she didn't have them herself. (ER 73, 76) That is, petitioner was not provided with the

places, dates, and times that he was alleged to have stalked or harassed his accusers, nor was he given the names of all his accusers.

Due process requires notice of the action in sufficient detail that the affected party can prepare a responsive defense. *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992), citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 1020, 25 L. Ed. 2d 287 (1970). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965).

Defendants' notice to petitioner did not give him sufficient details to prepare a meaningful response, nor was it "reasonably calculated" to apprize him of the action. Without specific reasons for his exclusion from campus, petitioner was prevented from presenting his objections and defending his exclusion from campus.[13] The Court of Appeals noted that when Souders appealed the second exclusion order "he did not deny stalking," (App. 5a), but petitioner was not informed at that time that he was accused of stalking and whom he was accused of stalking, as defendants have admitted. (ER 73, 76)

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13. When petitioner was given due process in the state stalking claims, the state court very narrowly restricted petitioner's access to the campus. For example, in the *Delgado* case, the Benton County Circuit Court ordered petitioner to stay away from Delgado and to avoid two buildings on campus at certain limited periods of time, but did not exclude him from the entire campus. (ER 33)

In failing to give petitioner detailed reasons for his exclusion from campus, the University violated its own policy. This policy — which mirrors the instructions given by Lucero to Campus Public Safety officers, (ER 18), states that a "trespass warning" should be given "only after other lessor (sic) measures of intervention have been exhausted and not been effective." (App. 22a). The policy provides that when a person is banned from the campus, he or she must be given "specific reasons" why the trespass warning was issued. (App. 23a) Furthermore, the officers are instructed to note "all alternative measures" taken to seek compliance before the warning was issued, and the details of the incident. (App. 24a) This information is to be made in a written report by the officer. *Id.*

Defendants failed to comply with these regulations. They gave no specific reasons for the exclusion to the petitioner. No alternative measures were taken or considered.

Second, the policy itself was defective — as written and as administered — in that petitioner was not given an opportunity, either before or after the exclusions, to be heard and to confront and/or cross examine his accusers. (ER 97) Where important decisions turn on question of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, *supra*, 397 U.S. at 269, 90 S. Ct. at 1021.

At the most, petitioner was allowed to "appeal" by writing a statement as to why he should not be excluded. (ER 26) However, this appeal process was meaningless when petitioner was given no detailed explanation for his exclusion to which he could address specific responses. There was no record.

Third, at a minimum, Due Process requires a hearing before an impartial tribunal. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 81, 34 L. Ed. 2d 267 (1972). This impartial tribunal requirement applies to both civil and criminal cases. The requirement that proceedings which adjudicate an individuals' interests in life, liberty, or property must be free from bias and partiality has been "jealously guarded." *Marshall v. Jerrico*, 446 U.S. 238, 241-42, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980). This principle of neutrality also applies to administrative adjudications, in order to protect the "independent constitutional interest in fair adjudicative procedure." *Id.* at 241-42 n.2, 100 S. Ct. at 1613 n.2.

Yet, when petitioner appealed the second exclusion order dated December 7, 1995, review of the case was made by defendant Lucero, the very person who had issued the exclusion order in the first place. (ER 34) Lucero had promised that she would issue an exclusion order as soon as Delgado filed for a Stalking Protective Order — without waiting to hear petitioner's side of the story. (ER 22) When asked at the deposition whether she was "under the circumstances" "an impartial person" to review his appeal, Lucero admitted that she was not. (ER 87-88)

Without detailed reasons for his exclusion, petitioner could not challenge his banishment. Without the names, dates, places, and times of the alleged occurrences, petitioner could not properly defend himself.

Petitioner was not afforded due process before he was deprived of his right to be present on the Oregon State University campus. Nor were there post-deprivation procedures that allowed him a meaningful opportunity to

challenge the exclusion. The University's failure to provide petitioner with notice and an opportunity to be heard violated the Due Process Clause of the Fifth Amendment. The Court of Appeals erred in failing to address the procedures employed by the University in excluding Souders from its campus.

CONCLUSION

In answer to the Questions Presented for Review, public universities should be required to provide procedural due process before excluding a member of the public — such as petitioner — from attending public meetings on campus at places that the University has designated as open to the public. These same constitutional considerations require a public university to provide due process of law before excluding such a member of the public from using the campus library, also open to the public, for research necessary to earning his or her livelihood.

This is not a case where the Court of Appeals merely misapplied a properly stated rule of law. Rather, the Court of Appeals failed to conduct the proper First Amendment analysis established by this Court's case law. This case must not stand as a precedent without review by this Court. Petitioner asks the Court to make explicit the requirement that arbitrary restriction of persons who are not university students, faculty or employees is not constitutionally permitted. More than 125 million people are potentially affected by the Court's ruling.

For all of the foregoing reasons, petitioner Robert Souders respectfully requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED NOVEMBER 15, 1999

Robert Hunter SOUDERS,

Plaintiff-Appellant,

v.

Donella J. LUCERO, individually and in her capacity as manager of security services for Oregon State University; Robert Brown; and Ty Duby, individually and as an Oregon State Police officer,

Defendants-Appellees.

No. 98-35527.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 14, 1999.

Filed Nov. 15, 1999.

* * *

Appeal from the United States District Court for the District of Oregon; Thomas M. Coffin, Magistrate Judge, Presiding. D.C. No. CV-97-6049-TC.

Before: FLETCHER and TASHIMA, Circuit Judges, and ISHII, District Judge.[1]

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1. The Honorable Anthony Ishii, United States District Judge for the Eastern District of California, sitting by designation.

Appendix A

FLETCHER, Circuit Judge:

Robert Hunter Souders appeals the district court's grant of summary judgment in favor of defendants in Souders' 42 U.S.C. § 1983 action alleging that Oregon State University ("OSU" or "University") Security Services employees wrongfully excluded him from the University campus after two female University students brought complaints against him for stalking. Souders, a stock broker and OSU alumnus, frequented the University campus to attend events and to use its library for his investment activities. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Robert Souders is a graduate of OSU, a state institution. Until served with an exclusion notice by campus security, he used the OSU library, and attended public events on campus. In December, 1993, OSU student, Nora Foster, obtained a Temporary Protective Stalking Order against Souders in the Benton County Circuit Court. The Order prohibited Souders from having any contact with Foster, from being inside Weniger Hall, and from being on the 5th and 6th floors of the OSU library at specified times.[2] The order did not ban Souders from the University campus.

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2. The Order was issued pursuant to former O.R.S. § 163.738 (1993) which provided that a stalking protective order may be entered against a person if the court finds by a preponderance of the evidence that the person, without legitimate purpose, intentionally, knowingly or recklessly engaged in repeated and unwanted contact

(Cont'd)

Appendix A

Effective January 1995, OSU Security Services had in place a policy for "Trespass on Campus — Exclusion Orders." It provided for the issuance of a written trespass warning[3] to non-students "as a means to provide protection, safety and security for the welfare of the college students, staff and faculty." It also laid out procedures to be followed upon issuance of a warning, including the requirement that the violator be informed of the reason he/she is being directed off campus, and of details of the incident. The policy provided for appeal by non-students to the Security Services Manager.

On February 22, 1995, after receiving complaints about Souders from Foster, and after confirming with the county district attorney's office that there was an outstanding stalking order against Souders, Oregon State Trooper and Campus Security employee, Ty Duby, arrested Souders in the library. Souders denied remembering committing any of the acts alleged by Foster. Duby served Souders with an Exclusion Notice, banning Souders from the entire OSU

(Cont'd)

with another person thereby alarming or coercing the other person. Souders successfully challenged the validity of the statute, which was found to be unconstitutionally vague by the Oregon Court of Appeals. See Foster v. Souders, 135 Or.App. 542, 899 P.2d 733 (Or.App.1995).

3. Although the policy's title indicates that it covers trespass warnings and exclusion orders, the substantive guidelines refer only to trespass warnings. Presumably, the University intended the policy to cover both. The University appears to use the terms "exclusion order" and "exclusion notice" interchangeably.

campus.[4] Souders appealed the exclusion notice. The appeal was denied by Donella Lucero, Manager of Campus Security. The letter of denial explained that the exclusion was effective until June 15, 1995 (at which time Foster would have graduated), and that if, after that date, Souders was "involved in any incident and found to be in violation of state law while on campus" he would again be excluded. The letter further stated that "[i]f you have any questions, please contact me at 737-3184."

In October 1995, on the advice of University Counsel, Caroline Kerl, Lucero issued guidelines to Campus Public Safety Officers regarding the use of exclusion orders. The guidelines explained that exclusion orders could be issued to persons considered "a danger to persons or property on campus" including any person who is "threatening a student or staff member." Students or staff were not to be excluded in this manner. Violations involving campus community

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4. The Notice stated:

> As a result of your conduct at Oregon State University, Corvallis, Oregon, you are no longer welcome on the Campus or any Oregon State University controlled property.
>
> You are hereby instructed to leave the Campus and may not return without approval in writing from the Manager of Security Services.
>
> Should you be found anywhere upon the Campus of Oregon State University at any time without permission, you will be deemed to be trespassing and will be prosecuted pursuant to the provisions of O.R.S. 164.245.

members were to be reviewed by the student judicial system or Human Resources. Under the guidelines, all exclusion orders had to be accompanied by an officer's report, including specific reasons the exclusion order was issued. Issuing officers were required to note that they had informed the offender of his/her right to appeal, and should give the offender a copy of the appeal form if possible. In addition, the issuing officer was required to include in the report any and all alternative measures taken to seek compliance before the warning was issued.

On December 7, 1995, OSU student, Joy Delgado, filed a complaint about Souders with Campus Security. Lucero immediately issued a second exclusion notice to Souders. Souders was not given a specific description of the complaints against him. Five days later, Delgado had a Temporary Stalking Protective Order issued against Souders in state court. Like the Foster order, this one did not ban Souders from the entire OSU campus. In the meantime, the Oregon State Police and OSU Security Services prepared and distributed a "SAFETY ALERT" flyer with a picture of Souders.

On February 28, 1996, Souders appealed the exclusion order in writing. He did not deny stalking Delgado or anyone else. On March 4, 1996, Souders was cited for criminal trespass by state police for being on the OSU campus in violation of the exclusion order.[5] On March 11, 1996, Lucero

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5. Similar charges followed his presence on campus on July 21, October 16, and October 30, 1996. Souders pleaded no contest to one of the four trespass charges, paid a $275 fine, and the other three trespass charges were dismissed. He did not challenge the validity of the exclusion notices or the trespass charges at the time of the trespass hearing.

denied Souders' appeal in a letter citing the fact of the current Stalking Protective Order and his arrest for criminal trespass on March 4. Souders did not contact Lucero about the appeal, but on eight occasions after the letter of denial, Souders or his attorney wrote to her asking for permission to return to campus for specific events. He was refused on all but three occasions. In February 1997, Souders' request for a hearing contesting the second exclusion order was denied by Caroline Kerl.

Souders filed this § 1983 action in federal court. Defendants moved for summary judgment and Souders made a cross-motion for summary judgment. Following a hearing, Magistrate Judge Coffin granted defendants' motion, denied plaintiffs' cross-motion and dismissed the action. The court found that Souders had not stated a claim under the First or Fourteenth Amendments. In the alternative, the court held that defendants were qualifiedly immune from the damage claims. Souders timely appealed.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir.1998). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir.1997). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Margolis, 140 F.3d at 852.

Appendix A

DISCUSSION

To establish a prima facie case under 42 U.S.C. § 1983, Souders must adduce proof of two elements: (1) the action occurred "under color of law" and (2) the action resulted in a deprivation of a constitutional right or a federal statutory right. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The first element is not disputed in this case: defendants are government employees being sued for conduct undertaken pursuant to their governmental duties and powers. See Tennessee v. Garner, 471 U.S. 1, 5-7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Defendants do contest the second element, specifically, that Souders' claim that in depriving him of his right to be on campus, the University did not provide the constitutionally adequate process he was due. We conclude that the exclusion order did not amount to the deprivation of a constitutional right and so Souders' § 1983 claim fails.

Much of Souders' argument hinges on the degree of openness of the University campus. He alleges that the University campus is effectively a public forum, like a street or a public park, which he had a right to visit. Evidence in the record certainly suggests that the University's policy is to maintain an open campus, and that members of the general public are welcome on campus without having to show identification or to register with campus officials. OSU's former Vice President stated in his deposition that:

> We have an open campus. As long as people stay within the bounds of behavior, this is acceptable. So whether somebody was in the library doing

> independent research or attending a public meeting, there would be no difference in the two situations. . . . We are an open campus, and we have a public university, and we are accessible to the public. I can't think of any general policies where we can exclude the public.

While the OSU campus may be open to the public, it does not follow that the University must allow all members of the public onto its premises regardless of their conduct. The Supreme Court has suggested that campuses are different from other public fora. In Widmar v. Vincent, 454 U.S. 263, 267-68, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Court said that a university opening its campus to student groups was required to justify discriminations and exclusions of certain groups under applicable constitutional norms. In dicta, the Court said that it has

> recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.
>
> At the same time, however, . . . [a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students

> alike, or that a university must grant free access to all of its grounds or buildings.

Id. at 267 n. 5, 102 S.Ct. 269 (emphasis added) (citation omitted). See also id. at 278, 102 S.Ct. 269 ("[College and university] facilities are not open to the public in the same way that streets and parks are. University facilities — private and public — are maintained primarily for the benefit of the student body and the faculty.") (Stevens, J., concurring); Greer v. Spock, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (rejecting the suggestion that "whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment").

The Court has also recognized the authority and flexibility necessary for educational administrators to carry out the missions of their institutions. See, e.g., Healy v. James, 408 U.S. 169, 193-94 & n. 24, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) ("[W]e do conclude that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees. In addition to the College administration's broad rulemaking power to assure that the traditional atmosphere is safeguarded, it may also impose sanctions on those who violate the rules."); id. at 203, 92 S.Ct. 2338 ("The government as . . . school administrator may impose upon . . . students reasonable regulations that would be impermissible if imposed . . . upon all citizens. And there can be a constitutional distinction between infliction of criminal punishment, on the one hand, and the imposition of milder sanctions on the other. . . .")

(Rehnquist, J., concurring); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) ("[W]here state-operated educational institutions are involved, this Court has long recognized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."); Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir.1969) ("We hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct.") (quoted with approval in Healy, 408 U.S. at 192, 92 S.Ct. 2338).

The record in this case offers no specific authority under which the University may exclude people from campus. Defendants cite to a rule which provides for the enforcement of university rules governing speech activities, but points to no broader general power to exclude from the campus persons who do not abide by the rules of conduct unrelated to speech. Cf. People v. Leonard, 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 834 (N.Y.1984) (finding university had promulgated rules authorizing exclusion from campus of an individual who, due to past conduct, was no longer welcome on campus); Watson v. Board of Regents of Univ. of Colorado, 182 Colo. 307, 512 P.2d 1162, 1164 (Colo.1973) (en banc) (denying on due process grounds the validity of an exclusion order issued pursuant to a university regulation which reserved to the university "the right to exclude those deemed detrimental to its well-being or incompatible with

its function as an educational institution"). However, the University did have a "Policy and Procedure" document for "Trespass on Campus — Exclusion Orders." Even with no rule or regulation explicitly allowing the University to exclude people for certain conduct, it is reasonable to infer such authority from the University's policy regarding the issuance of exclusion orders.

Souders' argument — that he has a right to be on the OSU campus, regardless of his conduct, because he is a member of the general public and the campus is open to the public — goes too far. This cannot be the case. Whatever right he has to be on campus must be balanced against the right of the University to exclude him. The University may preserve such tranquility as the facilities' central purpose requires. See Laurence H. Tribe, American Constitutional Law 690 (1980). Not only must a university have the power to foster an atmosphere and conditions in which its educational mission can be carried out, it also has a duty to protect its students by imposing reasonable regulations on the conduct of those who come onto campus.

There is no precedent that clearly applies to the facts of this case. Virtually every decision dealing with the question of the openness of college campuses is a free speech case, where the analysis centers on whether a university may prohibit or regulate on campus the speech or assembly activities of certain individuals or groups — both student and non-student.

We find useful the reasoning of a case somewhat analogous to this one cited by both parties. In United States

v. Albertini, 472 U.S. 675, 676, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985), some years after being barred from a military base, the defendant reentered the base during its annual open house for Armed Forces Day, a day on which members of the general public were allowed onto the base. The Court held that a person could be convicted for violating a statute which made it unlawful to reenter a military base after having been barred. Id. at 678, 105 S.Ct. 2897. The Court said that:

> The fact that respondent had previously received a valid bar letter [excluding him from the base unless he obtained written permission from base authorities] distinguished him from the general public and provided a reasonable grounds [sic] for excluding him from the base. That justification did not become less weighty when other persons were allowed to enter. . . . Where a bar letter is issued on valid grounds, a person may not claim immunity from its prohibition on entry merely because the military has temporarily opened a military facility to the public.

Id. at 687, 105 S.Ct. 2897.[6] Following the reasoning in Albertini, we conclude that the exclusion order was issued

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6. We distinguish the decision of the New York Court of Appeals in People v. Leonard, 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 835 (N.Y.1984). In that case, the court held that to establish that the issuance of a persona non grata letter to a non-student was valid, "the People must demonstrate that the particular order of exclusion had a legitimate basis and that, considering the nature and use of the subject property, its enforcement did not

(Cont'd)

by the University for the valid purpose of protecting its students, and not for conduct protected by the Constitution; that the University had not "so completely abandoned control that [its campus] became indistinguishable from a public street . . . ."; and that Souders was subject to the exclusion order's conditions.

Souders has not established a constitutionally protected interest in having access to the University. Because he had no constitutionally-protected interest, we need not decide whether the procedures employed in this case were adequate to afford the due process protection required before one can be deprived of a constitutionally-protected interest.

There is no hint in the record that the exclusion of Souders was based on anything other than his stalking behavior. In fulfilling its duty to protect students on campus, the University behaved reasonably in excluding Souders temporarily. Because we find that Souders has not established a prima facie case under § 1983, we need not reach the district court's alternate holding granting qualified immunity.

AFFIRMED.

(Cont'd)
unlawfully inhibit or circumscribe the defendant from engaging in constitutionally or statutorily protected conduct." Id. Mere presumption that the authorized public official had acted in a lawful manner was not enough, the court said. Id. Unlike in Leonard, the University here has offered substantial evidence indicating that the exclusion notice had a legitimate purpose, rationally related to the protection of its students. Souders has made no showing or indeed allegation of impermissible motive on the part of the University.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED APRIL 1, 1998 AND FILED APRIL 15, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 97-6049-TC

Filed 4-15-98

ROBERT HUNTER SOUDERS,

Plaintiff,

vs.

DONELLA J. LUCERO, individually and in her capacity as Manager of Security Services for Oregon State University, ROBERT E. BROWN, individually and as supervisor of Security Services for Oregon State University, and TY DUBY, individually and as an Oregon State Police Officer,

Defendants.

OPINION

* * *

COFFIN, Magistrate Judge

Plaintiff has frequented the Oregon State University (OSU) campus to attend events and to use its libraries for

his extensive investment activities. OSU has issued exclusion orders that have resulted in trespass charges.[1] As a result, plaintiff has brought this §1983 action seeking monetary damages arising from the exclusion orders and their enforcement and an injunction enjoining defendants from excluding him from the OSU campus. Presently before the court is defendants' motion (#45) for summary judgment and plaintiff's cross-motion (#61) for summary judgment.

Standards

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving

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1. The exclusion orders were based on plaintiff's stalking behavior. Background information on some of the behavior can be found in *Delgado v. Souders*, 146 Or. App. 580, 582 (1997).

party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Id.* at 32. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986); *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valadingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Insurance Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

Discussion

Plaintiff's claims fall in two categories.

1. *First Amendment*

Plaintiff's First Amendment claim consists of the contention that plaintiff was deprived of his rights "by defendants preventing him from attending and participating in public forums on OSU's campus." P. 3 of Cross-Motion (#61).

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In *United States v. Albertini*, 472 U.S. 675, 105 S.C. 2897 (1985), Albertini had been excluded from a military base nine years before he entered the base again during an Armed Forces Day open house. Albertini argued that the area of the base which he entered was, as part of the Armed Forces Day event, a public forum to which he had access despite the exclusion order. The Supreme Court assumed for argument purposes that the base was a public forum. Still no First Amendment rights were affected, the Court ruled, because the trespass notice was effective regardless of how publicly open or politically important a base event was. In *People v. Leonard*, 62 N.Y. 2d 404, 410-411, 465 NE 2d 831 (1984), New York's highest state court found that officials have broad power and great flexibility in securing safety of those on campus with exclusions unless an exclusion is predicated on a constitutionally protected activity.

Plaintiff's First Amendment claim fails because plaintiff was excluded from campus for stalking behavior, not for exercising assembly or speech rights. Defendants' actions of exclusion were not predicated on constitutionally protected activity by the plaintiff.

2. *Fourteenth Amendment*

Plaintiff's Fourteenth amendment claim consists of the contention that defendants denied "him liberty and property rights related to his vocation as an investor and den[ied] him due process of law under an OSU regulation . . . which had

process defects of omission and lack of enforcement . . . ."[2] P. 3 of Cross-Motion (#61).

The first problem with plaintiff's claim is that defendants have not deprived plaintiff of his right to pursue his vocation. Plaintiff, who describes himself as a sophisticated and very successful investor, may subscribe to the research publications he seeks or may obtain them from another library carrying such material. He could also possibly get the information in his home via the Internet. OSU does not have a monopoly on the knowledge plaintiff seeks.

Another problem with the claim is the fact that plaintiff received any process he might have been entitled to in the form of post-deprivation hearing opportunities.[3] Plaintiff has no property or liberty interest in being present on campus that he could be lawfully deprived of only after being accorded a hearing. In *People v. Leonard*, 62 N.Y. 2d 404, 465 NE 2d 831 (1984), New York's highest state court found that State University of New York had the general right to exclude persons from its campus and found:

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2. Plaintiff also appears to contend that he made a due process claim based on stigmatization. Such purported claim fails as it was not alleged and it fails to meet the requirements of *Blackburn v. Marshall City*, 42 F.3d 925, 935-936 (5th Cir. 1995) and *Paul v. Davis*, 424 U.S. 693 (1976).

3. Plaintiff has conceded that he could have litigated constitutional and other issues in his trial for trespass, see p. 29 of Cross-Motion #61, and that there were other means of judicial review as well. Plaintiff has not demonstrated that Oregon statutes or OSU regulations and procedures create a federal constitutional interest with federal constitutional protections that are applicable in this § 1983 case.

> no merit to defendant's argument that any order of exclusion would be unlawful, as violative of due process, absent the holding of a hearing prior to its issuance. Although the campus may be open generally for the enjoyment of the public, defendant, who concededly is not a student or employee at the campus, has no 'property' or 'liberty' interest in being present on the campus grounds that he could be lawfully deprived of only after being accorded a hearing."

Id. at 834-835. In *United States v. Albertini*, 783 F.d. [F.2d.] 1484 (9th Cir. 1986)[4], the Ninth Circuit rejected plaintiff's contention that due process required defendant to afford plaintiff a hearing at or before the time of plaintiff's exclusion. In *Kirstel v. State of Maryland*, 13 Md. App. 482, 491, 284 A.2d. 12 (1972), Kirstel, neither student nor employee, but a person who had some commitment from Towson State College to exhibit art, was excluded by the President and told to remove his art. He refused and was charged and convicted of criminal trespass. The appellate court rejected a contention that defendant was entitled to a hearing before the exclusion order could be enforced and affirmed the conviction. The court found that the hearing provided by the criminal trespass charge was fully adequate.[5]

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4. This opinion is the result of a remand from the previously mentioned Albertini Court.

5. Plaintiff has cited *Watson v. Board of Regents of University of Colorado*, 182 Colo. 307, 512 P.d. 1162 (1973). I do not find such case persuasive in this matter for several reasons. First, plaintiff

(Cont'd)

Appendix B

Based on the foregoing, and defendants' lengthy demonstration that their actions were not arbitrary, discriminatory or unreasonable, the due process claim fails.

CONCLUSION

Defendants' motion (#45) for summary judgment is allowed[6] and plaintiff's cross-motion (#61) for summary judgment is denied. This action is dismissed.

DATED this 1st day of April, 1998.

/s/ Thomas M. Coffin
THOMAS M. COFFIN
United States Magistrate Judge

(Cont'd)
is not part of the OSU community in any way. Second, plaintiff's exclusion orders were not as permanent as Watson's. Finally, protecting the immediate safety of OSU's female students could be deemed an emergency situation and plaintiff had post-deprivation hearing opportunities to challenge his exclusion.

6. As demonstrated at length by defendants, an alternative rationale for the dismissal of plaintiff's damage claims is qualified immunity.

APPENDIX C — CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Freedom of religion, speech and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Fourteenth Amendment

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United Sates, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

APPENDIX D — EXCERPTS FROM POLICY AND PROCEDURE OF OREGON STATE UNIVERSITY

OREGON STATE UNIVERSITY Number
Security Services 94-232

POLICY AND PROCEDURE Effective
01-95

POLICY: TRESPASS ON CAMPUS — EXCLUSION ORDERS

POLICY

6. *Non campus community/non-students*: It is the policy of Oregon State University Security Services to issue "trespass warnings" as a means of intervention to direct unwanted persons from areas of the campus or its boundaries as a means to provide protection, safety and security for the welfare of the college students, staff and faculty. (The "warning" must be written and used only after other lessor [sic] measures of intervention have been exhausted and not been effective. (*Indicate in the report.*))

7. *Oregon State University students*: As a matter of operational philosophy, it is the desire of the college to handle *student conduct issues and violations* on campus and through the *Student Conduct committee*, *Judicial Board*, or *College Administration*.

   Security Services is an "extension" of the institutional education process. Students enrolled at the college who violate student conduct codes, agreements, contracts, or

fail to cooperate with school officials, should be referred to the Dean of Students Office.

Officers may utilize the trespass warning as a tool to prohibit or direct students to leave certain areas, special events or instructional parts of the campus, pending a college judicial proceeding.

– This should be indicated on the trespass warning –

Our goal and desired outcome is to provide a safe situation for all concerned, minimize impact and seek compliance without threat or escalation.

PURPOSE

The purpose of this policy is to clarify when the trespass procedure should be implemented and avoid unnecessary or inadvertent use of the "warning" unless absolutely necessary.

WHO MAY REQUEST THE USE OF THE TRESPASS WARNING?

1. The College President, Chief Business Officer, Dean of Students, or any other official designated as the person in charge of a specific area/building may request a person to be directed off campus with "*reasonable*" explanation of the violation.

2. Any building manager responsible for *his/her specific* area/building with "*reasonable*" explanation of the violation.

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3. A Campus Security Services officer who witnesses an incident or is requested to represent the college as the "person in charge" in an incident where they were called or dispatched to assist (e.g. residence halls, college center, etc).

PROCEDURES

1. Any person(s) to receive a trespass warning must be *read verbally* the warning and given a written copy (white).

2. The warning must be completed in full.

3. The violator is to be informed the reason they are being directed off campus and the consequences should they return (e.g., arrest, vehicle impoundment, etc.).

4. A written report *must* be completed on all incidents when a trespass warning has been issued. The *white* copy of the warning is to be given to the subject and the other copies included with the report. The report *must* include, at a *minimum*:

   A) The *specific* reason the trespass warning was issued,

   B) All alternative measures taken to seek compliance before the warning was issued (IF ANY),

   C) The details of the incident,

   D) Any specific instructions or conditions given to the trespass person.

5. Officers should attempt to take a photograph of the person issued the warning.

6. If a person(s) returns having been issued a "trespass warning" and an Oregon State Police officer is summoned, the *yellow* copy of the warning is to be given to the officer.

7. File copy of citation, photo, and report in trespass book according to directions in book. Additional copy of report and photo, along with citation shall be given to supervisor.

APPEALS

Persons may appeal the trespass warning to the *Security Services Manager* unless it is before the conduct committee or the courts whereby final decisions will be reflected in the disposition of the judicial or quasi-judicial body. Appeal forms are available from Dispatch; they are located in the trespass book. Filled out appeal forms shall be given to Security Services Manager. An answer to the appeal will be sent certified mail to the violator, or upon disposition of the judicial or quasi-judicial body.

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Donella J. Lucero, Manager